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TEST # 36
1 HOUR CREDIT
ELIMINATION OF BIAS

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DISABILITIES CALIFORNIA STYLE

Although the U.S. Supreme Court has narrowed protection for the disabled, state laws may provide some help

By LORRAINE WOODWARK

In 1990, Congress passed the Americans with Disabilities Act (ADA). See 42 U.S.C. §12101 et seq. The law is modeled after Title V of the Rehabilitation Act of 1973 and the Civil Rights Act of 1964 that eliminated barriers based on race, national origin, age or sex. The ADA is a civil rights law that prohibits discrimination against qualified people with disabilities in employment; state and local government activities; places of public accommodation; transportation; or telecommunications services.

The ADA was enacted to assure equality of opportunity, full participation, independent living and economic self-sufficiency. However, the recent holdings of the U.S. Supreme Court seem to shred disability rights under the ADA.

In California, various state laws also protect disability rights. See the Unruh Act (Cal. Civil Code §51), the Fair Employment and Housing Act (FEHA) (Cal. Govt. Code §12900 et seq.), the Blind and Other Disabled Persons Act (Cal. Civil Code §54) and AB 2222 (Cal. Civil Code §12926.1). These laws afford legal protections for people with disabilities in California and may help stem the apparent shredding of disability rights under the ADA.

Shredding federal disability rights

During 2002, the Supreme Court justices provided opinions on four major ADA cases. These interpretations have had an adverse effect on workers with disabilities. At the beginning of 2002, *Toyota Motors v. Williams,* 122 S.Ct. 681, the ADA limited coverage of employees with carpal tunnel syndrome and other employment-related impairments.

By spring, the court made it clear that the ADA did not trump seniority rights over the rights of the employees with disabilities. *US Airways v. Barnett,* 122 S.Ct. 1516. By the start of summer, the Supreme Court upheld an Equal Employment Opportunity Commission regulation that permitted an employer to reject job applicants with medical conditions that might be exacerbated by workplace conditions. *Chevron U.S.A. Inc. v. Echazabal,* 000 U.S. 00-1406. Municipalities were determined not subject to punitive damages in private ADA suits. *Barnes v. Gorman,* 000 U.S. 01-682.

The result is a narrowing definition of who is considered disabled under the federal ADA.

Equality, independence, freedom

When he signed the ADA into law in July 1990, President George H.W. Bush was quoted in several newspapers as saying the occasion heralded a new day when "every man, woman and child with a disability can now pass through once closed doors into a bright new era of equality, independence and freedom." Unfortunately, the reality has not lived up to the promise.

The ADA protects individuals with a disability. This protection is broad since the law also protects those who have either a record of having a disability, are regarded as having a disability, are associated with disability organizations, or have been retaliated against due to having a disability or for acting on behalf of individuals with a disability.

The ADA's three-pronged test

The ADA defines disability as a physical or medical impairment that limits a major life activity. This is a three-pronged test and sets the framework to determine if an individual is protected under the ADA. The California laws also use the same test for protecting persons with disabilities.

The first part of the three-prong test is "physical or medical impairment." Examples, but by no means a complete list, of physical or mental impairment include medical conditions such as epilepsy, diabetes, paraplegia, morbid obesity, mental illness, HIV/AIDS, alcoholism and former drug addiction. In comparison, a temporary illness like a broken leg, pregnancy, non-severe obesity, use of crutches, acne, etc. do not qualify as a physical or mental impairment.

The next prong is "limits." The disability must limit the individual in performing a task that is more difficult for the individual than it is for most people or the average person. The ADA requires that the limitation be substantial while the California laws require the disability cause a limitation in performing tasks compared to other people or the average person.

Another difference between the California and the federal law is that California does not require mitigating measures.

The third prong is "major life activity." This prong is very broad and inclusive. In order to determine whether a disability limits a major life activity, the task required to be performed must be looked at. This task must be central to most people's daily lives. These tasks include brushing your teeth, getting dressed, preparing meals, eating, etc. The U.S. Supreme Court has emphatically taken a narrower view on what is a "major life activity."

Ella Williams (*Toyota Motors v. Williams,* supra.) developed carpal tunnel syndrome while working at the Toyota plant in Kentucky. She filed an ADA complaint when the company refused to reassign her to a less physically stressful position. The 6th U.S. Circuit Court of Appeals ruled that Williams satisfied the ADA definition of disability due to limitations on the "major life activity" of manual labor. The court found that Williams was "substantially" (the federal requirement) limited in her ability to perform repetitive work and grip tools with her hands and arms extended at shoulder level.

The U.S. Supreme Court unanimously reversed this ruling in an opinion written by Justice Sandra Day O'Connor that claimed the court of appeals focused on Williams' "inability to perform manual tasks associated only with the job" instead of determining whether "[Williams] is unable to perform the variety of tasks of central importance to people's daily lives," such as household chores, bathing and brushing her teeth.

Reasonable accommodations

The ADA requires a covered employer (15 or more employees) to provide a "reasonable accommodation" to a qualified employee with a disability, where such an accommodation would enable the employee to perform the essential functions of the job. The accommodations are unique to the individual and are not necessarily standard for the type of disability. However, the accommodation must effectively assist the employee.

If an accommodation is not achievable, an employer can discuss with the employee reasonable alternatives that will work for the employee. Anything that is effective to let the person perform essential functions of the job will suffice. Working at home, reassignment of job duties (except seniority), or providing a job coach (unless it is an undue burden) are all possible solutions to enable the employee to perform the job duties.

However, if the accommodation is an undue burden, an employer may not have to provide a reasonable accommodation requested. The ADA does not require that an employer change its products or services to reasonably accommodate a person with a disability. Cost alone is not a factor to deny reasonable accommodation.

However, if the employer claims the reasonable accommodation is cost prohibitive, the total business income is looked at and compared with the cost of accommodation requested to determine if it is feasible. Certain entities such as businesses with a large income or the government may not use the defense of undue burden.

A smaller business, however, may not have the income to provide reasonable accommodations and may successfully defend itself on the undue burden defense. Many accommodations are easy to achieve and often do not cost the employer much or any money. The ADA also protects an employee from being surcharged for a reasonable accommodation.

An employer may deny a reasonable accommodation if the employee is a "direct threat" to others or to the employee. An employee is a direct threat if it is determined that the employee poses a significant risk of harm on the job and it is likely that this harm will occur. The harm must be substantial (severe).

Mario Echazabal sued Chevron after the company refused to hire him when a physical examination revealed he suffered the effects of hepatitis C, which could be aggravated by exposure to toxins at the refinery where he was seeking a job. The U.S. Supreme Court held Echazabal's condition posed direct threat to himself. No reasonable accommodation could remove this direct threat. However, if the reasonable accommodation can prevent harm to others or the employee, then the direct threat defense will be limited.

California's fair playing field

In the vast majority of states (i.e., those without strong anti-discrimination statutes), the ADA is all that is available to persons with disabilities. Thus, federal rulings have an immediate and profound effect in those states. On the other hand, the situation is vastly different in the handful of states that have enacted their own "disability" statutes (i.e., California, New York and Illinois).

The focus of California's law is not to give "special rights" but to provide an even playing field for all. FEHA provides significantly broader protections in defining covered disabilities in three ways.

First, an individual need only be limited (the federal ADA requires substantially) in a major life activity and will qualify if his or her physical or mental impairment makes the achievement of the major life activity difficult.

Second, mitigating measures, such as medications and corrective devices, are not to be taken into account when assessing whether an individual has a qualified disability. For example, people with diabetes or epilepsy who use medication to control their conditions will still qualify even though the medication helps regulate their condition.

Third, an employee will be considered disabled in the major life activity of working even if his or her impairment impacts only one particular job, as opposed to a class of or a broad range of jobs.

The California FEHA also requires that employers provide reasonable accommodations to qualified workers with disabilities. The FEHA covers more claims and conditions relating to sick and injured employees, including more types of disabilities, than does the ADA. FEHA contrasts with the ADA in that it places the accommodation requirement on employers with five or more employees.

So how does an employee with a disability get an accommodation? An employee must let the employer know that he/she has a medical condition or disorder and request the accommodation either verbally or in written form. Failure to request an accommodation does not activate the protections afforded by disability laws.

Under California law, the employer is required to be receptive to engaging in a discussion to provide the accommodation. An employer who fails to engage in the interactive process can be sued for violating California laws, even if the accommodation would not work. Further, the employee may not be disciplined for requesting an accommodation.

Pre-employment inquiries

Employers and employees are often confused as to what can or cannot be asked during pre-employment inquiries. The law is broken down into three parts: before the offer, after the offer is made and on the job.

Before a job offer is made, an employer is prohibited from asking anything about a disability, including whether or not someone has a visible or hidden disability and/or what type of disability. The employment application cannot include a query whether an applicant has a disability.

However, the application can describe the essential job duties and ask whether an applicant is able to perform those duties. The application can also ask if an accommodation will be needed for testing or during the interview. During the interview stage, no questions can be asked about a person's disability or whether they have a disability.

After a job offer is made, but before the person has begun work, an employer can make a conditional offer requiring a medical examination. Such an examination must be job-related and consistent with a business necessity like safety concerns for the job applicant or other workers already on the job.

A job offer cannot be revoked for discriminatory reasons. If the medical examination reveals that the person is unable to perform the essential job functions, even with reasonable accommodations, a job offer can be revoked.

After the employee starts he/she employment, an employer is prohibited from asking questions regarding that employee's disability. Under FEHA it is permissible for employers to ask employee applicants questions regarding the disability to aid in providing the accommodation.

■ *Lorraine Woodwark is a Santa Barbara lawyer who practices both civil and criminal law in the local court system. She also represents pro bono clients in rural areas of the state.*

Test — Elimination of Bias
1 Hour MCLE Credit

1. The ADA is much broader than the FEHA.

2. FEHA requires mitigating measures while the ADA does not.

3. The defenses of undue burden and direct threat are not absolute defenses.

4. A reasonable accommodation may be granted even if other employees with the same disability do not request that accommodation.

5. In *Toyota v. Williams* (2002) 534 U.S. 184, the Supreme Court determined that carpal tunnel syndrome substantially limited a major life activity.

6. A major difference between the ADA and FEHA is that the ADA requires a disability to substantially limit a major life activity while FEHA does not require the limitation to be substantial.

7. The ADA defines disability as a physical or medical impairment while California law is much broader.

8. Both the ADA and FEHA provide that part-time or modified work schedules may be appropriate as reasonable accommodations.

9. An employer can inquire into a person's disability before, during and after employment.

10. The ADA bars discrimination against disabled people in employment, public accommodations and public transit, but does little to protect and enforce these rights.

11. A substantial limitation on a major life activity must not only prevent an individual from performing a task but also prevent them from performing daily tasks such as brushing teeth, preparing meals and dressing.

12. Under California law, medication that corrects a condition is not taken into consideration when assessing whether an individual has a qualified disability.

13. California law requires employers with 15 or more employees and federal law requires employers with five or more employees to provide reasonable accommodations to their employees with disabilities.

14. The ADA protects a qualified individual with a disability and may also protect those who have either a record of having a disability or are regarded as having a disability.

15. The ADA does not protect those who are merely associated with an individual who has a disability.

16. Employers can inquire on job applications whether an applicant requires an accommodation during testing or during the interview process.

17. If an employee is a direct threat to others or themselves, even with an accommodation, an employer can refuse to hire that person.

18. Under FEHA, an employee will be considered disabled in the major life activity of working even if his or her impairment impacts only one particular job, as opposed to a class of or a broad range of jobs.

19. In California, an employer who fails to engage in the interactive process can be sued for violating the law, even if the accommodation would not work.

20. An employer cannot make a conditional employment offer requiring a medical exam.

Certification

■ This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour in elimination of bias.

■ The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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TEST #36 — Disabilities California Style

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ELIMINATION OF BIAS

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